No. 91-1125

Supreme Court, U.S.
FILED
JAN 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GARLAND ARNOLDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

GARLAND ARNOLDT, a/k/a SHAGG, etc.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 636 permit a magistrate to accept a verdict in a felony trial if the defendant affirmatively consents?

2. Does 28 U.S.C. § 636 permit a magistrate to accept a verdict in a felony trial if the defendant does not affirmatively consent but fails to object?

3. Is the scope of 28 U.S.C. § 636(b)(3) limited by Fed. R. Crim. P. 25?

4. If 28 U.S.C. § 636 permits a magistrate to accept a verdict in a felony trial under some circumstances, is the statute consistent with Article III under those circumstances if the magistrate's actions are effectively unreviewable by the district court?

5. Does the Double Jeopardy Clause bar prosecution on RICO charges, 18 U.S.C. §§ 1962(c) & (d), where in order to establish predicate acts of racketeering, an essential element of the charges, the government will prove conduct that constitutes offenses for which the defendant has already been prosecuted?

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PETITION FOR WRIT OF CERTIORARI

Petitioner (defendant below) Garland Arnoldt petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1-14) is reported at 947 F.2d 1120 (4th Cir. 1991).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit (App. 1-14) was entered on October 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 pursuant to this Court's Rule 13.1 allowing 90 days for filing a petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §§ 636(a), (b) and (c), provisions of the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, are set forth in the Appendix: App. 24a.

Title 18 U.S.C. §§ 1962(c) and (d), provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, are set forth in the Appendix: App. 30a.

Fed.R.Crim.P. 25 is set forth in the Appendix: App. 31a.

STATEMENT OF THE CASE

"Arnoldt I." On August 2, 1988, petitioner was indicted by a federal grand jury sitting in Charleston, West Virginia in an eight count indictment charging him as follows: count 1, conspiracy to distribute cocaine, 21 U.S.C. § 846; counts 2, 3, 4 and 5, distribution of cocaine, 21 U.S.C. § 841(a)(1); count 6, possession of ammunition by a prohibited person, 18 U.S.C. §§ 922(g)(1) and 924(a); count 7, possession of a firearm by a prohibited person, 18 U.S.C. §§ 922(g)(1) and 924(a); and count 8, carrying a firearm during and in relation to a drug trafficking offense, 18 U.S.C. § 924(c)(1).

On November 7-9, 1988, petitioner proceeded to trial on counts 1, 2, 3, 4, 5 and 8, the district court having previously severed counts 6 and 7. After closing argument and the reading of the jury instructions, but before the return of the jury's verdict, the district judge announced in the presence of counsel and petitioner that he was ab-

senting himself from the city "for other business" and that he was delegating the authority and responsibility to preside over the return and pronouncement of the verdicts to a Magistrate, who did so preside on the following day. Petitioner neither consented nor objected. The jury returned verdicts of guilty on counts 1, 3, 4 and 5, and verdicts of not guilty on counts 2 and 8.

"Arnoldt II." On January 10, 1989, following petitioner's trial on the charges in *Arnoldt I* but before his sentencing, petitioner was indicted in fourteen (14) counts of an eighty-five (85) count indictment charging him as follows: count 1, RICO, 18 U.S.C. § 1962(c); count 2, RICO conspiracy, 18 U.S.C. § 1962(d); counts 7, 10, 13 and 71, distribution of controlled substances, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and counts 5, 6, 8, 9, 11, 12, 67 and 69, interstate travel in aid of racketeering, 18 U.S.C. § 1952(a)(3).

In count 1, eight predicate acts of racketeering were alleged in support of the RICO charge; in count 2, these predicate acts were realleged in support of the RICO conspiracy charge. The first four such predicate acts were those forming the basis of counts 1, 3, 4 and 5 in *Arnoldt I*, on which petitioner had already been convicted two months earlier.

On March 21-23, 1989, petitioner proceeded to trial on the indictment. The jury returned verdicts of guilty on all counts.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION TO ISSUES INVOLVING FEDERAL MAGISTRATES ACT

It is necessary that this Court revisit the Federal Magistrates Act, 28 U.S.C. §§ 631, *et seq.*, because the guidance it has provided thus far regarding the powers of magistrates is inadequate; because decisions of the Fourth and other circuits have overextended the Act's reach and

are incompatible with this Court's decisions; and because a circuit split has developed. In the instant case, the Fourth Circuit held that the Act authorizes a magistrate to preside over the return of a verdict in a felony case whenever the defendant fails to object and that such authorization is not constitutionally infirm. (App. 5, 6)[1]

As the Act does not explicitly authorize a magistrate to accept a felony-case verdict, any such conduct must be pursuant to the authorization *vel non* of 28 U.S.C. § 636(b)(3),[2] which provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." In its interpretation and application of this provision, this Court has consistently emphasized and relied upon the structure and legislative history of the Act and this provision; the rule of *ejusdem generis*; and the necessity that the magistrate's actions be effectively reviewable by the district judge. *See Peretz v. United States*, 111 S.Ct. 2661 (1991) (jury *voir dire*); *Gomez v. United States*, 109 S.Ct. 2237 (1989) (unanimous) (jury *voir dire*); *United States v. Raddatz*, 447 U.S. 667 (1980) (suppression motion); *Matthews v. Weber*, 423 U.S. 261 (1976) (social security benefit case); *Wingo v. Wedding*, 418 U.S. 461 (1974) (habeas corpus hearing; specific holding subsequently nullified by statute). The instant Petition raises four principal issues concerning the Magistrates Act:

(1) The initial question for this Court is whether the Act authorizes the acceptance of a felony-case verdict by a magistrate under *any* circumstances, *e.g.*, even if the defendant affirmatively consents. Petitioner contends that it does not.

(2) The next question is whether, if affirmative consent is a *sufficient* condition for such authorization, it is

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[1] A-X refers to p. X of the Appendix to this Petition.

[2] As codified by the 1976 Amendment. This provision was codified as § 636(b) in the original 1968 Act.

a *necessary* condition, *i.e.*, whether, *e.g.*, failure to object will suffice. Petitioner's contention is that mere failure to object is insufficient to trigger authorization by the Act.

(3) A collateral question is whether § 636 (b)(3) must be read *in pari materia* with other law. Petitioner contends that its reach is limited by Fed.R.Crim.P. 25.

(4) Finally, this Court must decide whether, if there are conditions under which the Act authorizes a magistrate to accept a verdict, the Act under those conditions is consistent with Article III given the nature of acceptance of a verdict as it relates to its reviewability by the district court. This issue requires that this Court reach a question concerning the implications of the structural protections of Article III that it recently avoided in *Peretz* (Magistrates Act) and in *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631 (1991) (Appointments Clause). Petitioner contends that acceptance of a verdict is of a nature such as to make it, in practice, effectively unreviewable, therefore rendering unconstitutional the Act as so construed.

II. ACCEPTANCE OF A VERDICT

In order to determine whether acceptance of a felony-case verdict can ever, *e.g.*, even when the defendant affirmatively consents, be one of the "additional duties" [3]

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[3] This Court has thus far not carefully parsed § 636. Sections (a)(1), (a)(2), (a)(3), (a)(4), and (b)(3) speak of "powers and duties," "power," "power," "power," and "duties" respectively. "Surely there is a distinction between 'additional duties' and 'additional powers'." *United States v. Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989) (Altimari, J., dissenting), *cert. denied*, 493 U.S. 1082 (1990). Indeed, that the distinction was made intentionally is apparent from the structure of §(a)(1), which refers to *powers* and *duties conferred* or *imposed*. The parallelism is patent: Power is conferred; a duty is imposed. One would not speak of imposing a power. Section (b)(3), with which the instant Petition is concerned, therefore speaks of "duties" *as distinct from*

covered by § 636(b)(3), it is necessary to seek what guidance is available from this Court's prior decisions, and to examine the legislative history of the Act, the provisions of other pertinent statutes, and the characteristics of the return-of-verdict stage of a trial. For acceptance of a verdict by a magistrate to be permitted, there must be "clear evidence that Congress actually intended to permit magistrates to take on [that] role," *Peretz*, 111 S.Ct. at 2666, because reading such a role into the Act implicates a defendant's constitutional right to have an Article III judge preside at his trial. In addition, the provision should be interpreted in light of the Act's structure and purpose, *id.* at 2666 n.7, and in accordance with the principle of *ejusdem generis*:[4] Any additional duties performed pursuant to the general authorization of § 636(b)(3) (should be related to the duties specified in § 636, *id.* at 2666; should be consistent with the basic purposes of the statute, *id.* at 2667; and should not be of far greater importance than the specified duties, *id.* In sum, any interpretation should balance the interests of the defendant and the policies that undergird the

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"powers." This Court, however, has not yet dealt with that distinction *vel non* or with the distinction's necessary implication that the language of § (b)(3) actually gives magistrates much less authority than is apparent at first glance.

Also, § (b)(3) speaks of *additional* duties. Additional to what? Additional to those actions of which §§ (b)(1), (b)(2), and (c) speak, within which § (b)(3) is sandwiched? Or additional to those actions specified in § (a), which alone contains the term "duties"? If the latter, it should be additional only to those actions specified in § (a)(1) because only § (a)(1) speaks of "duties" (§§ (a)(2), (a)(3), and (a)(4) speak only of "power"): if so, and because accepting a verdict is much more akin to those actions specified in §§ (a)(2), (a)(3), and (a)(4) than it is to what United States commissioners used to do, § (a)(1), it may be concluded that accepting a verdict would be a power, and not a duty, and would therefore not fall under § (b)(3).

[4] When general words are in close proximity to the enumeration of particular classes, the general words should be construed as applying only to the same general class as those enumerated.

Act; and any duty given the magistrate must be one of the district court's "subordinate duties," *id.* at 2668, and must be separate from the "actual trial," [5] *id.* at 2668 n.9.

Ejusdem Generis. This rule was applied in all but name [6] in *Gomez*:

> When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties.
>
> . . . [T]he carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.

109 S.Ct. at 2241, 2245 (unanimous), *reaff'd in Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631, 2637 (1991) (unanimous) (*quoting Gomez*, and also stating that "the list of specifically enumerated duties followed the general grant of authority and provided the outlines for the scope of the general grant;" *i.e.*, *Freytag* contracted the loose "reasonably should bear some relation to" standard of *Gomez* to a standard whereby the specific duties defined the limits of those delegable pursuant to § (b)(3)). Thus, the reach of § (b)(3) should be determined by looking to those neighboring provisions which specify duties. Section 636(b)(1)(A), which specifies duties, specifically refers to "pretrial matter[s]," as distinct from the "actual trial," *vide supra*. Such references pervade the legislative history. *See* H.R. Rep. No.

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[5] This theme pervades the Act's legislative history. *See Peretz*, 111 S.Ct. at 2672 and n.1 (Marshall, J., dissenting) (collecting citations); *Gomez*, 109 S.Ct. at 2245 and n.23 (collecting citations); *Matthews v. Weber*, 423 U.S. at 272 n.7.

[6] "The canon of *ejusdem generis* keeps the 'additional duties' clause from swallowing up the rest of the statute. See *Gomez*. . . ." *Peretz*, 111 S.Ct. at 2679 (Scalia, J., dissenting).

1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 4252, 4254 ("pre-trial . . . proceedings"); H.R. Rep. No. 1609, 94th Cong. 2, 4, 6, 7, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6162 ("matter preliminary to trial"), 6164 ("certain preliminary matters"), 6165 ("preliminary or pretrial processing"), 6166 ("pretrial proceedings"), 6167 ("a variety of pretrial and preliminary matters"); S.Rep. No. 74, 96th Cong. 3, 4, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1469, 1472 ("pretrial . . . proceeding," "pretrial matters"). The inclusion of jury *voir dire, see Peretz* and *Gomez*, within the reach of § (b)(3) is not inconsistent with § (b)(1)(A) because, although jury voir dire is considered to be part of the trial for most (but not all) purposes, *see Gomez*, 109 S.Ct. at 2246; *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 516 (1948) (Stevens, J., concurring), it at least may arguably be viewed as *quasi*-pretrial or *quasi*-preliminary.[7] The return of a verdict, however, can hardly be so viewed.

Consistency with the Laws of the United States. Not only should a provision of a statute be interpreted so as to be in accord with the provisions of the same statute, it should, of course, be interpreted so as to be in accord (or at least not conflict) with the provisions of other statutes. Indeed, § 636(b)(3) itself explicitly mandates that a magistrate's additional duties "not [be] inconsistent with the . . . laws of the United States."[8] One such

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[7] This aspect of legislative history is discussed further. *Vide infra.*

[8] This Court's repeated interpretation of § 636(b)(3) according to the rule of *ejusdem generis, vide supra*, may at first glance appear to be inconsistent with this language of § 636(b)(3). Section 636(c) begins, "Notwithstanding any provision of law to the contrary. . . ." How, then, can § 636(b)(3) be read in conjunction with § 636(c) if the former contains "not inconsistent with the . . . laws of the United States" language, while the latter contains "[n]otwithstanding any provision of law to the contrary" language? The answer is that the "[n]otwithstanding any provision of law to

law is Fed. R. Crim.P. 25(b), which provides that, *after a verdict*, the trial judge may be replaced by another judge for reason of absence, death, sickness, or other disability. Rule 25(a), however, provides that, *during trial*, the trial judge may be replaced by another judge for reason of death, sickness, or other disability. Thus, during trial, *i.e.*, before a verdict, the trial judge may not be replaced by another judge for reason of mere absence, as absence is specified as a reason in Rule 25(b) but not in Rule 25(a). If the trial judge may not be replaced by a *judge* during trial, he *a fortiori* may not be replaced by a *magistrate*. *See Government of the Virgin Islands v. Paniagua*, 922 F.2d 178, 183 (3rd Cir. 1990); *contra United States v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986). Yet that is what happened to Petitioner for reason of mere absence "for other business."

Reviewability. The *sine qua non* of the Act and this Court's decisions has been reviewability, *i.e.*, effective review of the actions of the magistrate by the district court, a requirement that pervades the language of the Act and its legislative history. ". . . Congress contemplated that district courts would retain the greatest possible scrutiny and control of a magistrate's trial jurisdiction." *Gomez*, 109 S.Ct. at 2242 (citations and internal quotes omitted); *see also id.* at 2244 (magistrate's trial jurisdiction must

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the contrary" language of § 636(C) is not intended to refer to substantive provisions of law:

> The inital sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary—". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court". It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate". It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court".

H.R. Rep. No. 1609, 94th Cong. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6162, 6169.

"remain subject to judicial review"); *id.* at 2245 ("subject to . . . judicial review"); *Raddatz*, 447 U.S. at 681 ("under the district court's total control"); *id.* at 681 n.8 ("subject always to ultimate review by a judge"). A magistrate can handle pretrial matters only "subject to reconsideration by the district court." *Gomez*, 109 S.Ct. at 2243-44. And, specifically with regard to § (b)(3), "[t]he Act's sponsors made it quite clear that . . . a district judge would retain ultimate responsibility for decision making it every instance in which a magistrate might exercise additional duties jurisdiction." *Matthews v. Weber*, 423 U.S. at 270 (citations and internal quotes and brackets omitted), *reasoning reaff'd Gomez*, 109 S.Ct. at 2242.[9] Although this Court has held that the Act authorizes the consensual conduct of jury *voir dire* by a magistrate even though that is a function whose performance "may be difficult for a judge to review with infallible accuracy," *Peretz*, 111 S.Ct. at 2669 n.12, that performance is still substantially reviewable, and it occurs early enough in the proceedings so that substantial judicial and other resources have not yet been invested, therefore making it realistic to expect that the judge would abort the proceedings if the magistrate's performance raised concerns. That is hardly the case at the verdict stage, when it may realistically be expected that the judge would cause the entire trial to be redone[10] only in the face of the most egregious error by the magistrate. The magistrate's conduct in addressing the jury, reading its verdict, ensuring that it has considered all of the counts and completed the verdict form correctly, ensur-

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[9] For further discussion of this aspect of the legislative history of the Act, *see TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972), *endorsed by Wingo v. Wedding*, 418 U.S. 461, 470 n.10 (1974).

[10] A new trial would be the only way to correct the magistrate's performance in receiving the verdict as "it could not be seriously suggested that the original jury could be reassembled," *Government of the Virgin Islands v. Paniagua*, 922 F.2d 178, 183 (3rd Cir. 1990).

ing unanimity by polling the jurors individually, and handling the numerous problems that may arise should that process not go smoothly "according to script" [11] is therefore effectively unreviewable.[12]

Nature and Importance of Return of Verdict. To be assignable to a magistrate, an "additional duty" must be one of the district court's "subordinate duties" and not be of far greater importance than a magistrate's specified duties. *Vide supra.* Receiving the verdict and polling the jury is not a mere ministerial task. It is the culmination of the trial. To the defendant and to the public, it is the most important part of the trial,[13] and its significance should not be "diluted," *Allen v. United States*, 921 F.2d 78, 80 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 78 (1991), by replacing a judge with a magistrate. The jury should not be given the impression that the return of its verdict and the polling of its individual members are "merely a

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[11] For one of many examples, *see United States v. Johnson*, 720 F.2d 519, 520-21 (8th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984).

[12] The Ninth Circuit disagrees. *See United States v. Saunders*, 641 F.2d 659 (9th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981). While recognizing that "the Magistrates Act comports with Article III *because it* subjects the magistrates' rulings to de novo determination by a federal district judge," *vide infra*, and that it is for that reason that this Court has allowed magistrates to perform inherently judicial tasks only when under the supervision of an Article III judge, *see id.* at 663 (emphasis added) (citations omitted), the Ninth Circuit went on to express the pollyannish view that "[i]f the magistrate had taken any action [in scheduling jury deliberations] disagreeable to the trial judge, it would have been the judge's duty to correct it by holding a new trial [, and] [t]o suppose that the trial judge would be dissuaded from carrying out this duty by the public expense of a new trial is to ignore the constitutionally preserved independence of Article III judges." *See id.* at 664.

[13] It is by no means the most important part of the trial in the eyes of the Seventh Circuit. *See United States v. Curry*, 767 F.2d 328, 330 (7th Cir. 1985) ("routine dut[y]"); *Taylor v. Oxford*, 575 F.2d 152, 154 (7th Cir. 1978) ("administrative type function[]").

routine matter of form," *United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir. 1983). It is necessary that the polling of the jury be done with full solemnity with a judge presiding in order that its purposes be realized, just as it is required that certain statements be sworn rather than routinely signed (sworn:unsworn = judge: magistrate). It is important, too, that the result be accepted by the defendant and the public. The return of the verdict is the high point of the trial, and "[g]reater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge," *Adventures in Good Eating v. Best Places to Eat*, 131 F.2d 809, 815 (7th Cir. 1942).

Relation of Return of Verdict to Actual Trial. To be assignable to a magistrate, an "additional duty" must be separate from the actual trial. *Vide supra.* The return of the verdict is not.

Legislative History and Circuit Law. All of the above leads to the conclusion that the Act does not authorize a magistrate to accept a verdict—even if the defendant affirmatively consents. All of the above, however, is not the whole story. H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6162, 6172 (emphasis added) states:

> Under this subsection [636(b)(3)], the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters." This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and *accept returns of jury verdicts where the trial judge is unavailable.* This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in court.

The idea that magistrates may accept verdicts may have originated in a description by a district judge of the duties then being assigned to a magistrate in his district. *See United States v. Trice*, 864 F.2d 1421, 1427-28 n.4 (8th Cir. 1988), *cert. dismissed*, 491 U.S. 914 (1989). That this single, albeit explicit, reference in the legislative history to the return of a verdict should outweigh all of the above would appear to be a rather implausible proposition. Yet it has served as the basis for two Circuits to hold that magistrates may accept verdicts. *See Arnoldt* (the instant case), App. 6; *United States v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986). The Fourth Circuit in *Arnoldt*, however, failed to grasp that that section of the legislative history had been implicitly rejected by and was inconsistent with the *ratio decidendi* of *Gomez* and *Peretz*, *viz.*, the rule of *ejusdem generis*, *vide supra*. The conflict with *Gomez* and *Peretz* arises because the snippet of legislative history quoted above is merely illustrative of what immediately precedes it in the House Report, *viz.*, the statement that "placing this authorization [additional duties] in an entirely separate subsection [(b)(3)] emphasizes that it is not restricted in any way by any other supecific grant of authority to magistrates." The statement that § (b)(3) was not to be restricted in any way by the classes of duties enumerated in the other sections is in direct conflict with *Gomez* and *Peretz*, which were grounded in the requirement that § (b)(3) be construed as applying only to the same general class as those enumerated, *see, e.g.*, *Gomez*, 109 S.Ct. at 2245 ("reasonably should bear some relation to"), and is in conflict *a fortiori* with *Freytag*, 111 S.Ct. at 2637 ("specifically enumerated duties . . . provided the outlines for the scope of the general grant"). Therefore, *Arnoldt* is fatally inconsistent with this Court's prior decisions.

III. CONSENT

The analysis above concerned whether the Act permits a magistrate to accept a verdict in a felony case if the defendant affirmatively consents. If this Court decides

that the Act does, it must next address the question whether affirmative consent is a necessary component of the Act's grant of authority, *i.e.*, it must decide whether the Act's grant of authority is limited to circumstances where the defendant affirmatively consents or whether it includes also circumstances where, *e.g.*, the defendant merely fails to object, which is what actually happened in the instant case.[14] *Peretz* and *Gomez* require "consent." The question is what constitutes "consent" within the meaning of the Act.[15]

Peretz describes how *Gomez* applied the rule of *ejusdem generis* to the question of consent (just as it was applied to the question of scope, *vide supra*):

> Carefully reviewing the duties that magistrates were expressly authorized to perform, we focused on the fact that those specified duties that were comparable to jury selection in a felony trial could be performed only with the consent of the litigants. The legislative history of the statute also emphasizes the crucial nature of the presence or absence of the litigants' consent. We noted that, in 1968 when magistrates were empowered to try "minor offenses/" the exercise

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[14] It will be assumed in the analysis, *infra*, that the reasoning which applies to the determination of whether affirmative consent is a necessary component of the Act's grant of authority for a magistrate to perform a particular duty is independent of the nature of that duty, *i.e.*, that the reasoning employed by this Court thus far in its interpretation of the Act applies to the instant question as well. In principle, the "degree" of consent required need not necessarily be independent of the nature of the duty; for example, this Court could read into the Act a sliding scale whereby, under the balancing test, *Peretz*, 111 S.Ct. at 2668, the degree of consent that is necessary increases as the magnitude of the defendant's interest (as determined from the nature of the duty) increases. So it is probably premature to insert such a complexity into the instant proceedings at the *cert.* stage, it will not be done, and what may prove to be an overly simplistic analysis will be employed in this Petition.

[15] What it means in other contexts, *e.g.*, waiver of the constitutional right to an Article III judge, *see* n.17, *infra*, is a different question.

> of that jurisdiction in any specific case was conditioned upon the defendant's express written consent. Similarly, the 1976 Amendment provided that a magistrate could be designated as a special master in any civil case but only with the consent of the parties. And in 1979, when Congress enlarged the magistrate's criminal jurisdiction to encompass all misdemeanors, the exercise of that authority was subject to the defendant's consent . . . A critical limitation on this expanded jurisdiction is consent. As amended in 1979, the Act states that "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." [T]he magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent.

111 S.Ct. at 2666-67 (citations and internal quotes omitted, footnote merged into text). *Peretz* continued:

> This case differs critically from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it. The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's "additional duties" may not include supervision of jury selection when the defendant has consented.
>
> * * * *
>
> . . . [W]ith the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over voir dire at a felony trial.
>
> We therefore conclude that the Act's "additional duties" clause permits a magistrate to supervise jury selection in a felony trial provided the parties consent.[16]
>
> * * * *

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[16] This sentence is immediately followed by:

> In reaching this result, we are *assisted by* the reasoning of the Courts of Appeals for the Second, Third, and Seventh Circuits, all of which, following our decision in *Gomez*, have concluded

> In sum, the structure and purpose of the Federal Magistrates Act convince us that supervision of voir dire in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent. The Act evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection but conditions their authority to accept such responsibilities on the consent of the parties. . . . [A] defendant . . . need only decline to consent . . . . However, when a defendant does consent to the magistrate's role, the magistrate has jurisdiction to perform this additional duty.

Id. at 2667-69 (citations, internal quotes, and footnote omitted). Therefore, "consent" for purposes of interpretation of the Act means affirmative consent.[17, 18]

> that the rationale of that opinion does not apply when the defendant has not objected to the magistrate's conduct of the *voir dire*.

111 S.Ct. at 2667-68 (citations omitted, emphasis added). This Court therefore noted, but did not adopt, the "fails to object" meaning of "consent."

[17] "Consent" for purposes of determining whether a defendant has waived any constitutional infirmity in the Act appears to mean "fails to object," *see* n.15, *supra*, at least when the actions of the magistrate are effectively reviewable by the judge. *See* part IV of *Peretz*, 111 S.Ct. at 2669-71. This Court has not helped matters by using the same word ("consent") to convey different meanings in different parts of *Peretz* (*compare* parts II and III with part IV) without flagging what it was doing, and it has made matters even worse by merging those meanings in favor of the part IV meaning in its closing statement in part V that "permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant *raises no objection* is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act," *id.* at 2671 (emphasis added, footnote omitted). Its reference to the purpose of the Act in a context in which it was actually referring instead to the question of waiver can result in misunderstanding in the lower courts, *see*, e.g., *United States v. Martinez-Torres*, 944 F.2d 51, 52 (1st Cir. 1991), and should be corrected.

[18] For further discussion of this aspect of the legislative history of the Act, *see TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972),

As the consent in *Peretz* itself was affirmative but not written, it would appear that the requirement for affirmative consent may be satisfied by oral consent. *Contra Peretz*, 111 S.Ct. at 2666-67 (repeated references to written consent); Fed.R.Civ.P. 73(b) (interpreting § 636(c) (recall *ejusdem generis*) to require written consent). This Court needs to clarify the nature of the affirmative consent that is required.

Finally, two Circuit decisions (one of which was post-*Peretz*) conflict with *Gomez* and *Peretz*. *See United States v. Sawyers*, 902 F.2d 1217, 1220 and n.2 (6th Cir. 1990) (citing *Gomez* for the proposition that a magistrate may accept a verdict when no objections are made), *cert. denied*, 111 S.Ct. 2895 (1991); *United States v. Jones*, 938 F.2d 737, 744 (7th Cir. 1991) (citing *Peretz* for the proposition that a magistrate may conduct jury selection when no objection is made). Correction by this Court is necessary.

IV. FED.R.CRIM.P. 25

There is a split between the Third, the Sixth and (implicitly) the Fourth Circuits (instant case) with regard to whether Fed.R.Crim.P. 25 limits the scope of § 636(b)(3), *see* "Consistency with the Laws of the United States," *supra*, which needs to be resolved by this Court.

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endorsed by Wingo v. Wedding, 418 U.S. 461, 470 n.10 (1974). *See also* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 4252, 4254 ("knowledgeable waiver"); S. Rep. No. 74, 96th Cong. 6, 7, 14, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1469, 1474 ("consents to such trial in writing;" "written consent requirement"), 1475 ("affirmative consent;" "consent in writing"), 1482 ("truly voluntarily consent"); H.R. Conf. Rep. No. 444, 96th Cong. 8, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1487, 1489 ("voluntariness, knowingness, and willingness of the consent").

V. CONSTITUTIONAL INFIRMITY

Peretz left in a state of some uncertainty the question whether 28 U.S.C. § 636(b)(3) would be consistent with Article III under those circumstances *vel non* where a magistrate may accept a verdict in a felony trial. Part IV of *Peretz*, 111 S.Ct. at 2669, begins with some apparently unambiguous and definitive statements to the effect that even a defendant who merely fails to object has no Article III protections.[19] *Peretz*, however, then goes on to undercut those statements. It assumes that, because of structural protections provided by Article III, failure to object (or even a defendant's affirmative consent) really cannot eliminate Article III infirmities of the Act generally.[20] It then explains at length why, even if there were infirmities, consent could eliminate them in the circumstances of *Peretz* (jury *voir dire*) *because* those actions of the magistrate were reviewable by the judge:

> The decision whether to empanel the jury the selection of which a magistrate has supervised . . . remains entirely with the district court. Because the entire process takes place under the district court's total control and jurisdiction, there is no [Article III] danger.
>
> . . . The reasoning in Justice Blackmun's concurring opinion [in *Raddatz*] is controlling here:
>
> . . . [T]he handling of suppression motions invariably remains completely in the control of the federal district court. . . . [T]he judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise recommit the matter to the magistrate with instructions. . . . [T]he district judge is waiting in the wings, fully

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[19] An assumption analogous to that made in n.14, *supra*, is made here.

[20] For an elaboration of this thesis, *see Peretz*, 111 S.Ct. at 2676-77 (Marshall, J., dissenting).

> able to correct errors. . . . [T]he judges retain complete supervisory control over the assistants' activities. . . . If a defendant in a future case . . . request[s] review, nothing in the statute precludes a district court from providing the review that the Constitution requires. Although there may be other cases in which *de novo* review by the district court would provide an inadequate substitute for the Article III judge's actual supervision of the *voir dire*, the same is true of a magistrate's determination in a suppression hearing. . . .

111 S.Ct. at 2669-71 (citations and internal quotes omitted).[21] The same is not true, however, with regard to acceptance of a verdict by a magistrate. There, review would not even rise to being insufficiently adequate; it would be effectively nonexistent. And it would be very unrealistic to expect that a judge would "replay" an entire trial as he might a suppression hearing or jury *voir dire*. *See* "Reviewability" discussion, *supra*. Therefore, Article III protections may well be implicated in the instant case. "Indeed, this problem admits of no easy solution." *Peretz*, 111 S.Ct. at 2677 (Marshall, J., dissenting). The Fourth Circuit's decision was conclusory and did not engage this issue. (App. 5, 6)

This Court needs to define the parameters of any implication of Article III structural protections. It did not do so in *Peretz*, and it avoided the question in *Freytag* (Appointments Clause case):

> Petitioners would have us . . . adopt[] a general rule that "structural" constitutional rights as a class

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[21] The Ninth Circuit has interpreted *Peretz*'s explanation of why the correctness *vel non* of its assumption (consent does not cure infirmities), *supra*, is inconsequential. It did so, however, in a manner that may actually modify *Peretz*'s holding: "The Court in *Peretz* . . . effectively held that the conduct of voir dire by a magistrate does not implicate Article III structural protections, for the Court emphasized that the district courts retain 'total control and jurisdiction' over the process." *United States v. Judge*, 944 F.2d 523, 525 (9th Cir. 1991).

> simply cannot be forfeited . . . The Court neither accepts nor rejects that proposal. . . . Thus, when there occurs a similar forfeiture of an Appointments Clause objection—or of some other allegedly structural constitutional deficiency—the Courts of Appeals will remain without guidance as to whether the forfeiture must, or even may, be disregarded.

Freytag, 111 S.Ct. at 2646 (Scalia, J., concurring in the judgment; joined by O'Connor, Kennedy, Souter, JJ.). The Courts of Appeals remain without guidance in the Magistrates Act context as well.

VI. THE DOUBLE JEOPARDY CLAUSE AND "COMPOUND-COMPLEX FELONIES"

As the Fourth Circuit noted in its opinion, *Arnoldt*, App. 8-9, it is undisputed that petitioner's successive prosecution under RICO ("Arnoldt II") satisfies the traditional test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." However, subsequent to petitioner's convictions, this Court fashioned a new rule in *Grady v. Corbin*, 110 S.Ct. 2084, 2093 (1990):

> [A] technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials . . . [A] subsequent prosecution must do more than merely survive the *Blockburger* test . . . [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

In *Grady*, the defendant was indicted for reckless manslaughter/criminally negligent homicide arising from an automobile accident in which he had been cited for driving while intoxicated and failure to keep to the right

of the median. Prior to indictment, the defendant had pleaded guilty to the citations. Following indictment, he sought a writ of prohibition barring prosecution on the manslaughter/homicide charges, on the ground that such prosecution would violate the Double Jeopardy Clause.

The State conceded that two of the three reckless/negligent acts upon which it would rely at trial were those forming the basis of the traffic convictions: driving while intoxicated and failure to keep to the right of the median. The New York Court of Appeals granted the writ, holding that even though the second prosecution "passed" the test of *Blockburger*, it was nonetheless barred by the "pointed dictum" of *Illinois v. Vitale*, 447 U.S. 410 (1980).

This Court affirmed, articulating the seemingly bright-line rule set forth above, *Grady*, 110 S.Ct. at 2093.

The application of *Grady* to the facts of this case is readily apparent. In count 1 of petitioner's second indictment, the government alleged eight predicate acts of racketering in support of its RICO charge, 18 U.S.C. § 1962(c), and in count 2 of the indictment, the government re-alleged these predicate acts in support of its RICO conspiracy charge, 18 U.S.C. § 1962(d). The first four such acts were those forming the basis of petitioner's convictions on counts 1, 3, 4 and 5 of Arnoldt I. Under 18 U.S.C. § 1962(c) and (d), App. 27, one essential element of the substantive and conspiracy offenses is that "during the time alleged in the indictment . . . the defendant engaged in a pattern of racketeering activity composed of at least two acts of racketeering." Thus, petitioner's prosecution on both RICO charges in Arnoldt II, counts 1 and 2, was prohibited under the holding and rationale of *Grady*, since "to establish an essential element of offense[s] charged in that prosecution," *id.* at 2093, *i.e.*, predicate acts of racketeering, "the government will prove conduct that constitutes offense[s] for which the defendant has already been prosecuted," *id.*, *i.e.*, counts 1, 3, 4 and 5 of Arnoldt I.

The Fourth Circuit rejected this analysis, App. 9-13, holding that in the context of "compound-complex felonies" or "'multilayered' instances of criminal conduct invariably occurring at different places and times," App. 11, the double jeopardy issue was governed by *Garrett v. United States*, 471 U.S. 773 (1985), a case predating *Grady* by five years. The court's holding was grounded in policy concerns, *i.e.*, that ". . . prosecutions under statutes such as RICO . . . call for a calculus reflecting the concerns expressed in *Garrett*," App. 11, rather than the concerns expressed in *Grady*, which would in this context, the court believed ". . . unduly infringed prosecutorial discretion and effectively 'force the Government's hand' with respect to prosecution under RICO," App. 12, *citing Garrett*, 471 U.S. at 790.

Relying upon the decisions of the Third and Eleventh Circuits in *United States v. Pungitore*, 910 F.2d 1084, 1111 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 2009, 2010 (1991); *United States v. Gonzalez*, 921 F.2d 1530, 1535-39 (11th Cir.), *petition for cert. filed*, No. 90-7857 (U.S. April 29, 1991), the Fourth Circuit disposed of petitioner's claims in conclusory fashion despite its recognition that ". . . *Grady* does not limit itself to a specific class of crimes." (App. 11.)

> We do not believe that the Supreme Court intended *Grady* to compel such a result. . . . Thus, in the context of successive prosecutions for a substantive RICO violation and for the predicate crimes used to prove RICO, the double jeopardy analysis is controlled by *Garrett*. *See Pungitore*, 910 F.2d at 1109 ("[T]he reasoning in [*Grady*] logically extends only to offenses arising from a single discrete event. We do not think that the Supreme Court meant to imply that the double jeopardy clause forecloses successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places."

App. 12-13 (footnote omitted).

The reasoning of the Fourth Circuit in the instant case, as well as the Third and Eleventh Circuits in *Pungitore* and *Gonzalez*, leads to a result which may arguably be sound from a policy standpoint but is constitutionally infirm under the analysis of *Grady*. This issue needs to be addressed and resolved by this Court, for the guidance not only of the district and circuit courts but also of government prosecutors who may be "setting and pursuing [their] strategy," App. 12, where the Double Jeopardy Clause permits no such strategy to be employed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5043

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

GARLAND ARNOLDT,
Defendant-Appellant.

No. 89-5448

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

GARLAND ARNOLDT, a/k/a/ Shagg,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of West Virginia, at Charleston,
Charles H. Haden, II, Chief District Judge.
(CR-88-134-2, CR-89-3-2)

Argued: June 7, 1990

Decided: October 11, 1991

Before RUSSELL, WILKINSON, and WILKINS, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Wilkins wrote the opinion, in which Judge Russell and Judge Wilkinson joined.

COUNSEL

ARGUED: Barbara H. Lupton, HUNT & WILSON, Charleston, West Virginia, for Appellant. Hunter P. Smith, Jr., Assistant United States Attorney, Charleston, West Virginia, for Appellee. ON BRIEF: Hunt L. Charach, Federal Public Defender, Charleston, West Virginia, for Appellant. Michael W. Carey, United States Attorney, Charleston, West Virginia, for Appellee.

OPINION

WILKINS, Circuit Judge:

The issues raised by appellant after convictions in two separate trials have been consolidated on appeal. For purposes of clarity the two trials are identified as *Arnoldt I* and *Arnoldt II*. In *Arnoldt I* appellant contends that the district court erred in designating a United States Magistrate[1] to preside over the return of the jury's verdict and in failing to make specific factual findings before imposing a fine. In *Arnoldt II* he asserts that his trial violated the double jeopardy clause of the fifth amendment to the United States Constitution and

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[1] Purusant to Act of December 1, 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5117, United States Magistrates appointed under 28 U.S.C.A. § 631 (West Supp. 1991) are now known as United States Magistrate Judges.

that the district court erred in finding that he was an organizer or leader of a criminal activity as defined in the sentencing guidelines. He also asserts that the district court erred in certain evidentiary rulings, in instructing the jury, and in refusing to grant a mistrial. We affirm in part, reverse in part, and remand.

I.

A. *Arnoldt I*

Arnoldt was indicted in August 1988 for one count of conspiracy to distribute cocaine, 21 U.S.C.A. § 846 (West Supp. 1991), four counts of distribution of cocaine, 21 U.S.C.A. § 841(a) (West 1981), one count of carrying a firearm during and in relation to a drug trafficking crime, 18 U.S.C.A. § 924(c)(1) (West Supp. 1991), one count of possession of ammunition by a convicted felon, 18 U.S.C.A. § 922(g)(1) (West Supp. 1991), and one count of possession of a firearm by a convicted felon, *id.* He was convicted of the conspiracy count and three of the distribution counts. He was acquitted of one count of distribution and of carrying a firearm during and in relation to a drug trafficking crime.[2]

Following closing argument and the charge to the jury, the district judge announced that he was delegating the responsibility of presiding over the return of the jury's verdict to a United States Magistrate. Arnoldt did not object to this delegation. The magistrate subsequently received the verdict, polled the jury, and remanded the defendant to custody.

At the sentencing hearing, the district court determined that Arnoldt's offense level was 26, which, combined with criminal history category IV, produced a sentencing

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[2] The district court had previously granted Arnoldt's motion to sever the possession of ammunition and firearm counts and Arnoldt was convicted of these counts at a subsequent trial.

guidelines range of 92-115 months. The district court imposed a sentence of 98 months plus two concurrent 60-month sentences for the ammunition and firearm violations. Additionally, the district court imposed a $5,000 fine and a $300 special assessment.

B. *Arnoldt II*

On January 10, 1989, Arnoldt was named in 14 counts of an 85-count indictment resulting from an investigation of the Pagan Motorcycle Club. Count 1 alleged that Arnoldt violated 18 U.S.C.A. § 1962(c) (West 1984) of the Racketeer Influenced and Corrupt Organizations Act (RICO); Count 2 alleged that he participated in a RICO conspiracy, 18 U.S.C.A. § 1962(d) (West Supp. 1991); Counts 7, 10, 13, and 71 alleged that he distributed controlled substances, 21 U.S.C.A. § 84(a)(1); and Counts 5, 6, 8, 9, 11, 12, 67, and 69 alleged that he engaged in interstate travel in aid of racketeering, 18 U.S.C.A. § 1952(a)(3) (West Supp. 1991). The jury convicted Arnoldt of all counts.

Counts 5 through 13 represented conduct occurring before November 1, 1987 and thus were pre-guidelines offenses. Because the offenses represented in Counts 1, 2, 67, 69, and 71 were committed after November 1, 1987, the sentences were governed by the Sentencing Reform Act of 1984, 18 U.S.C.A. §§ 3551, *et seq.* (West 1985 & Supp. 1991), and the sentencing guidelines promulgated by the United States Sentencing Commission. The guidelines counts were grouped pursuant to U.S.S.G. § 3D1.2.[3] The base offense level for the underlying activity (distribution of over 1,990 grams of cocaine) was 26. U.S.S.G. § 2D1.1(a)(3). This level was increased by 2 for possession of a firearm during the commission of a drug offense, U.S.S.G. § 2D1.1(b)(1), and by 2 for

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[3] All references are to the October, 1988 version of the *Guidelines Manual*.

obstruction of justice, U.S.S.G. § 3C1.1. The district court also found that Arnoidt was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, U.S.S.G. § 3B1.1(a), and therefore further increased his offense level by 4, resulting in an adjusted offense level of 34. Offense level 34 combined with criminal history category V produced a sentencing guidelines range of 235-293 months. The district court sentenced Arnoldt to 292 months imprisonment.

As to the pre-guidelines counts, the court imposed five years imprisonment each on Counts 5, 6, 8, 9, 11, and 12 to be served concurrently with each other and with the guidelines sentence, 15 years imprisonment on Counts 7 and 10 to be served concurrently with each other and with the guidelines sentence, and 20 years imprisonment on Count 13 to be served concurrently with the guidelines sentence. In addition, the district court ordered the sentence imposed in *Arnoldt II* to be served concurrently with the sentence in *Arnoldt I*.

II.

Arnoldt contends that designating a magistrate to preside over the return of the jury's verdict in *Arnoldt I* violated the Federal Magistrates Act, 28 U.S.C.A. §§ 631, *et seq.* (West Supp. 1991), and Article III of the United States Constitution. He bases his argument on *Gomez v. United States* in which the Supreme Court unanimously held that the Federal Magistrates Act does not authorize a magistrate to preside over jury selection in a felony trial when a defendant objects. 490 U.S. 858, 875-76 (1989). Because jury selection was not specifically designated as a permissible duty under the Act, the *Gomez* Court's inquiry was whether jury selection was authorized by the residual provision of the Act which provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Con-

stitution and laws of the United States." 28 U.S.C.A. § 636(b)(3). The Court found that the Act did not authorize magistrates to preside over the selection of the jury, concluding that "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function." 490 U.S. at 875-76 (footnote omitted). Thus, because the magistrate lacked authority to preside over jury selection in the face of a defendant's objection and because this error was not harmless, the Court reversed Gomez's conviction.

The Court recently returned to this issue in *Peretz v. United States*, 111 S. Ct. 2661 (1991).[4] In *Peretz*, the Court held that the "additional duties" clause of the Federal Magistrates Act permits the delegation of jury selection in a felony trial to a magistrate when the defendant consents to the delegation. *Id.* at 2668. The Court also concluded that if a defendant fails to object to the delegation of jury selection to a magistrate, the defendant has no constitutional right to have an Article III judge preside. *Id.* at 2669.

Arnoldt first claims that allowing a magistrate to preside over the return of the jury's verdict violated his right to have an Article III judge preside over his felony trial. Recognizing that criminal defendants often waive substantive constitutional rights by their failure to make a timely assertion of the right, the *Peretz* Court held that because the defendant had "raised no objection to

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[4] Following oral argument of Arnoldt's appeals the Supreme Court granted certiorari in *Peretz* to address the questions of whether delegation of jury selection in a federal felony trial to a magistrate violated the Federal Magistrates Act or Article III when the defendant consented to the delegation and, if so, whether the defendant's consent constituted a waiver of the violation. 111 S. Ct. 781 (1991). We held this opinion in abeyance pending a decision by the Supreme Court.

the judge's absence" he had waived his right to demand the presence of an Article III judge. *Id.* Similarly, Arnoldt failed to object to the delegation of authority to the magistrate to preside over the return of the jury's verdict and, therefore, waived any resulting constitutional error. We conclude that the reasoning of *Peretz* controls our disposition of this argument.

Next, Arnoldt asserts that the Federal Magistrates Act prohibits magistrates from presiding over the return of the jury's verdict. However, Arnoldt overlooks the specific approval of this function in the legislative history of the "additional duties" clause. A House Report on the 1976 amendments to the Act explained that the "additional duties" clause "would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, *and accept returns of jury verdicts where the trial judge is unavailable*." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6172 (emphasis added). Heeding this "clear legislative command" when confronted with identical facts, the Sixth Circuit held that the district court did not err in permitting a magistrate to receive the verdict in a criminal case, *United States v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986) ("In accepting that verdict, the magistrate performed a function contemplated by Congress. . . ."); *see Kociemba v. G. D. Searle & Co.*, 707 F. Supp. 1517, 1529 (D. Minn. 1989) (citing H.R. Rep. No. 1609 and stating that "[d]efendant does not dispute the power of the Magistrate to accept the jury's verdict"). Moreover, because Arnoldt waived his constitutional right to have an Article III judge preside, no constitutional considerations preclude the district court from delegating this duty to the magistrate. *Peretz*, 111 S. Ct. at 2667; *Virgin Islands v. Williams*, 892 F.2d 305, 311 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990). Consequently, we find that the delegation of authority to pre-

side over the return of the verdict qualifies as an "additional duty" under section 636(b)(3).

III.

After the parties filed their briefs but prior to oral argument the Supreme Court announced its decision in *Grady v. Corbin*, 110 S. Ct. 2084 (1990). At oral argument we requested that counsel provide supplemental briefing regarding the double jeopardy issue.[5]

A.

The double jeopardy clause of the fifth amendment provides that a defendant shall not "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Traditionally, claims of double jeopardy were analyzed by reference to the analysis employed in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

Grady, however, finding *Blockburger* afforded inadequate protection to defendants successively prosecuted, fashioned a new rule. In *Grady*, defendant Corbin drove his vehicle across the center line of a road, striking two oncoming vehicles. The driver of one of the oncoming vehicles subsequently died as a result of injuries sus-

[5] We disagree with the government's contention that Arnoldt waived the double jeopardy argument.

tained. Corbin pled guilty to misdemeanor driving while intoxicated and failing to keep right of the median and was sentenced to a $350 fine, a $10 surcharge, and a 6-month license revocation. Subsequently, a grand jury indicted Corbin for reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault and driving while intoxicated. The Supreme Court affirmed the judgment of the New York Court of Appeals that prosecution of Corbin for these charges was prohibited by the double jeopardy clause. Observing that the *Blockburger* test was conceived "'in the context of multiple punishments imposed in a single prosecution,'" *Grady*, 110 S. Ct. at 2090-91 (quoting *Garrett v. United States*, 471 U.S. 773, 778 (1985)), the Court reasoned that *Blockburger* was forged without appreciation of the hazards and concerns raised by successive prosecutions. *Id.* at 2092.

> [A] technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. . . . [A] subsequent prosecution must do more than merely survive the *Blockburger* test. . . . [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Id. at 2093. Applying this test to the facts before it, the Court held that successive prosecution of Corbin, while permitted under *Blockburger*, nevertheless violated the double jeopardy clause, for "the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." *Id.* at 2094.

B.

Arnoldt was indicted in Count 1 of *Arnoldt II* for a RICO violation under 18 U.S.C.A. § 1962(c). The indictment alleged that Arnoldt committed eight predicate acts. The first four predicate acts constituted four counts of drug-related conduct for which Arnoldt had been convicted in *Arnoldt I* and which occurred between January and June 1988. The remaining four predicate acts incorporated by reference four substantive counts in *Arnoldt II*—three counts alleging cocaine distribution occurring from April to June 1986 and one count alleging interstate travel in aid of racketeering occurring on June 12, 1988.[6]

Arnoldt asserts that use of his *Arnoldt I* convictions as predicate acts in a subsequent RICO prosecution violates the double jeopardy clause. He contends that *Grady* compels reversal of the subsequent RICO conviction because to establish an essential element of the RICO count (*i.e.*, the predicate acts), the government proved conduct constituting offenses for which he had been convicted in *Arnoldt I*.

It is undisputed that under the circumstances here the successive prosecution of Arnoldt satisfies the *Blockburger* test. *See, e.g., United States v. Grayson*, 795 F.2d 278, 283 (3d Cir. 1986) ("successive prosecutions for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause"), *cert. denied*, 479 U.S. 1054, 481 U.S. 1018 (1987); *accord United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Boldin*, 772 F.2d 719, 728-30 (11th Cir. 1985), *modified on other grounds*, 779 F.2d 618, *cert. denied*, 475 U.S. 1048, 1098, 1110 (1986); *United States v. Black*, 759 F.2d 71, 73-74 (D.C. Cir. 1985) (per curiam);

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[6] Because special interrogatories were not submitted to the jury it is impossible to know the predicate acts on which the jury relied in finding Arnoldt guilty of violating RICO.

United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Phillips*, 664 F.2d 971, 1009 n.55 (5th Cir. Unit B 1981) (dicta), *cert. denied*, 457 U.S. 1136, 459 U.S. 906 (1982); *United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).

In *Garrett v. United States*, 471 U.S. 773 (1985), the Court held that it was not a violation of the double jeopardy clause to prosecute a continuing criminal enterprise (CCE) offense, *see* 21 U.S.C.A. § 848 (West Supp. 1991), after a prior conviction for one of the predicate offenses. The defendant in *Garrett* was charged in a March 1981 multi-count drug indictment in the Western District of Washington. He pled guilty to one count of importation of marijuana. In July 1981 he was indicted in the Northern District of Florida on several drug counts, including a count for engaging in a CCE from January 1976 to July 1981. At trial, evidence of conduct underlying the defendant's prior marijuana importation conviction was introduced to prove one of the three predicate offenses that must be shown to prove a CCE violation.

The Supreme Court found dubious the defendant's argument that the importation conviction was a lesser included offense of the CCE. The Court observed that the lesser included offense doctrine is associated with *Brown v. Ohio*, 432 U.S. 161 (1977), which held that when the misdemeanor of joyriding was a lesser included offense in the felony of auto theft, a prosecution for the misdemeanor barred a prosecution for the felony. However, the Court in *Garrett* was unimpressed with the defendant's reliance on *Brown*:

> Obviously the conduct in which Garrett was charged with engaging in the [CCE] indictment, when compared with that with which he was charged in the Washington indictment, does not lend itself to the simple analogy of a single course of conduct—

> stealing a car—comprising a lesser included misdemeanor within a felony. Here the continuing criminal enterprise was alleged to have spanned more than five years; the acts charged in the Washington indictment were alleged to have occurred on single days in 1979 and 1980. . . . Whenever it was during the 5 1/2-year period alleged in the indictment that Garrett committed the first of the three predicate offenses required to form the basis for a CCE prosecution, it could not then have been said with any certainty that he would necessarily go ahead and commit the other violations required to render him liable on a CCE charge. Every minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony, but the same simply is not true of Garrett. . . . These significant differences caution against ready transposition of the "lesser included offense" principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case.

Garrett, 471 U.S. at 788-89.[7] The government maintains that double jeopardy analysis for violations of

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[7] The Court went on, however, to assume that Garrett's Washington offense was a lesser included offense in order to reject his double jeopardy claim on the ground that the CCE offense had not been completed at the time Garrett was indicted in Washington. *Id.* at 791-93. The Court affirmed Garrett's convictions, rebuffing the double jeopardy challenge on the basis of *Diaz v. United States*, 223 U.S. 442 (1912), which involved an initial prosecution for assault and battery followed by a prosecution for homicide when the victim eventually died from injuries inflicted in the course of the assault. The Court in *Diaz* rejected the double jeopardy claim, holding that the two prosecutions were not for the same offense. *Diaz* was cited in *Grady* as a permissible exception to the "traditional" double jeopardy rule applicable " 'where the State is unable to proceed on the more serious charge at the outset because the additional facts

complex, compound statutes is unaffected by *Grady* and remains governed by *Blockburger* and *Garrett*.

We believe the principles enunciated in *Grady* govern the paradigmatic "single course of conduct" case, but that prosecutions under statutes such as RICO and CCE—statutes targeted at "multilayered" instances of criminal conduct invariably occurring at different places and times—call for a calculus reflecting the concerns expressed in *Garrett*. The Third and Eleventh Circuits have adopted a nearly identical interpretation of *Grady*, distinguishing successive prosecutions for RICO and its underlying predicates, which these courts held to be constitutionally permissible, from *Brown* and *Grady*, which involved a single course of conduct. *United States v. Pungitore*, 910 F.2d 1084, 1111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009, 2010, 2011 (1991); *United States v. Gonzalez*, 921 F.2d 1530, 1535-39 (11th Cir.), *petition for cert. filed*, No. 90-7857 (U.S. April 29, 1991).

We recognize that *Grady* does not limit itself to a specific class of crimes. We also appreciate the bedrock principle underlying the double jeopardy clause itself: "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . ." *Green v. United States*, 355 U.S. 184, 187 (1957). Despite these weighty concerns, we believe a contrary result would unduly infringe prosecutorial discretion and effectively "force the Government's hand" with respect to

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necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.'" *Grady*, 110 S. Ct. at 2090 n.7 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977)). The *Diaz* exception is inapplicable here since arguably Arnoldt's RICO offense was complete at the time of the *Arnoldt I* trial because he had already committed more than two predicate acts. Moreover, at the time the indictment in *Arnoldt I* was returned, all of the predicate acts had occurred.

prosecution under RICO. *Cf. Garrett*, 471 U.S. at 790. We do not believe the Supreme Court intended *Grady* to compel such a result. When grappling with a complex, multilayered-conduct statute such as RICO, the government must be given reasonable discretion in setting and pursuing its strategy. Indeed, here the most recent alleged predicate act occurred before, but was not discovered until after, the date of the *Arnoldt I* indictment. Without ample discretion, the government would be forced to either proceed against a defendant for violations that might later serve as predicate acts and foreclose a RICO prosecution in the future or allow predicate acts to go unpunished in anticipation that at some future time the RICO elements would coalesce.

Thus, in the context of successive prosecutions for a substantive RICO violation and for the predicate crimes used to prove RICO, the double jeopardy analysis is controlled by *Garrett*.[8] *See Pungitore*, 910 F.2d at 1109

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[8] This court recently addressed the application of *Grady* to a prosecution for conspiracy to distribute cocaine and heroin under 21 U.S.C.A. § 846 (West Supp. 1991) in which evidence of an episode of defendant's possession of cocaine and heroin that had formed the basis of a previous prosecution for possession with intent to distribute in violation of 21 U.S.C.A. § 841(a)(1) (West 1981) was introduced as evidence of defendant's participation in the conspiracy. *United States v. Clark*, 928 F.2d 639 (4th Cir. 1991). Concluding that the evidence of the prior possession did not establish an element of the second offense, the court held that the subsequent prosecution was not a double jeopardy violation. *Id.* at 642. Similarly, the conduct prosecuted in *Arnoldt I* was used as evidence of the "pattern of racketeering activity" element of the RICO offense, *see United States v. Hooker*, 841 F.2d 1225, 1227 (4th Cir. 1988), but could not, standing alone, establish an essential element of the RICO offense, *see Clark*, 928 F.2d at 642, i.e. "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity," *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis omitted). Moreover, even if the argument that the prior convictions alone established the RICO pattern element was deemed persuasive, we conclude that the analysis in *Garrett* applies to subsequent prosecutions of multilayered offenses.

("[T]he reasoning in [*Grady*] logically extends only to offenses arising from a single discrete event. We do not think that the Supreme Court meant to imply that the double jeopardy clause forecloses successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places.").

IV.

In *Arnoldt I*, the district court imposed a fine of $5,000 payable in monthly installments. Arnoldt contends the district court failed to adequately consider the factors set forth in 18 U.S.C.A. § 3572 (West Supp. 1991). *Cf.* U.S.S.G. § 5E4.2(d) (listing factors court "shall consider" in determining amount of fine). In *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989), we vacated and remanded for reconsideration of the fine imposed because the district court failed to make specific findings with regard to the factors listed in the predecessor statute to section 3572. Because the district court imposed the fine without complying with *Harvey*, we vacate the sentence and remand for consideration of those statutory factors.

V.

Arnoldt next contends that the district court erred in finding that he was an organizer or leader of a criminal activity and increasing his offense level by 4. *See* U.S.S.G. § 3B1.1(a). A determination by the district court of a defendant's role in the offense is a factual determination and is thus reviewable under the clearly erroneous standard. *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989). The sentencing guidelines provide that in determining whether a defendant is an organizer a court should consider factors that include:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the

> recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, comment. (n.3).

At the sentencing hearing the district court determined that Arnoldt was an organizer based on his perceived membership in the "mother club," the governing body of the Pagan Motorcycle Club, and his alleged presidency of the Kentucky chapter of the Pagans. However, because the government conceded at oral argument that Arnoldt was not a member of the mother club, we remand on this issue. Because the record was not adequately developed we offer no opinion on the significance of Arnoldt's alleged presidency of the local Kentucky chapter.

VI.

In conclusion, we affirm Arnoldt's convictions and find his remaining contentions to be without merit. However, we vacate the sentence imposed in *Arnoldt I* and remand for consideration of the statutory factors. We also vacate the guidelines sentence imposed in *Arnoldt II* and remand for a determination of Arnoldt's role in the offense.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Criminal No. 2:89-00003-06

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GARLAND ARNOLDT,
Defendant.

ORDER

[Entered Mar. 23, 1989]

On March 20, 1989, the Defendant appeared in person and by counsel, Barbara Fleisher, and the Government appeared by Michael W. Carey, United States Attorney, and John A. Kessler, Assistant United States Attorney, for a hearing on pretrial motions filed by the Defendant. After having carefully considered the motions and the argument of counsel, the Court ruled, *inter alia*, as follows:

1. Denied the Defendant's motion to dismiss.

2. Instructed counsel concerning procedures to be followed at trial with regard to evidence which is the subject of the Defendant's written motion in limine.

3. Denied the Defendant's oral motion in limine regarding the admissibility of evidence of a prior conviction, but noted the Defendant's option to renew such motion.

4. Denied the Defendant's motion to dismiss or rearraign upon the Government's representation that the

original indictment was signed by the grand jury foreperson.

5. In response to the Defendant's motions to strike nicknames and to exclude the indictment from the jury room, expressed its intention to redact the indictment substantially.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: March 23, 1989

/s/ Charles H. Haden II
CHARLES H. HADEN II
Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

Docket No. 2:89-00003-06
Charleston, West Virginia
March 21, 22, 23, 1989
9:00 o'clock a.m.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GARLAND ARNOLDT,
Defendant.

JURY TRIAL

VOLUME II

TRANSCRIPT OF TRIAL TESTIMONY &
COURT'S INSTRUCTIONS

BEFORE THE HONORABLE CHARLES H. HADEN, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

MR. MICHAEL CAREY,
United States Attorney

MR. JACK KESSLER,
Assistant United States Attorney
Charleston, West Virginia

For the Defendant:

MS. BARBARA FLEISHER,
Attorney
Charleston, West Virginia

* * * *

[235] MS. FLEISHER: Your Honor, I have motions to make outside the presence of the jury.

THE COURT: All right. We will recess and I will hear defense motions.

THE COURT: Ladies and gentlemen, the Government has rested, but I've given the Government permission to reopen so that I can read you four different convictions that occurred in respect to the defendant, which the Government alleges are part of the predicate offenses that are involved in the racketeering offense here. So I'm going to cover these for you.

On January 23rd of this year this Court entered a judgment of conviction as to Mr. Arnoldt on a charge of conspiracy to distribute cocaine and three charges of distribution of cocaine. And I'll go over these charges with you so you'll be aware particularly of the dates and the amounts, if any, that were involved.

In Count No. One, the conspiracy charge, it's charged as follows: "That from in or about January of 1988 to on or about, and that was modified to June 22nd of 1988, in or near Cabell and Putnam counties, West Virginia, and within the Southern District [236] of West Virginia, and elsewhere, Garland Arnoldt, the defendant, and other persons whose identities are both known and unknown to the grand jury, did unlawfully and knowingly combine, conspire, confederate, and agree, and have a tacit understanding with each other, to commit offenses against the United States," that is, to violate Title 21, United States Code, Section 841(a)(1), "and the purpose and object of this conspiracy was knowingly, intentionally, and without authority to distribute, and to possess with intent to distribute, cocaine, a Schedule II controlled substance, as designated by Title 21, United States Code, Section 812 (c), Schedule 2(a)(4), within the Southern District of West Virginia, and elsewhere, in violation of Title 21, United States Code, Section 846." As I say, Mr. Arnoldt was convicted of that offense, and final judgment was entered in the court on January 23, 1989.

In addition, he was convicted of three offenses of distribution. They are as follows, and this particular count is Count Three: "That on or about April 18, 1988, at or near Huntington, Cabell County, West Virginia, and within the Southern District of West Virginia, Garland Arnoldt, the defendant, unlawfully, knowingly, and without authority distributed approximately one ounce of cocaine, also known as coke, etcetera, to a person whose identity is known to the grand jury, in violation of Title 21, United States Code, Section 841(a)(1)."

The next count, Count Four, "That on or about May 4, 1988, [237] in Putnam County, West Virginia, and within the Southern District of West Virginia, Garland Arnoldt, the defendant, unlawfully, knowingly, and without authority distributed approximately 29.40 grams of cocaine, also known as coke, etcetera, to a person whose identity is known to the grand jury, in violation of Title 21, United States Code, Section 841(a)(1)."

And Count No. Five, finally, "That on or about May 16, 1988, in Putnam County, West Virginia, and within the Southern District of West Virginia, Garland Arnoldt, the defendant, unlawfully, knowingly, and without authority distributed approximately 26.56 grams of cocaine, also known as coke, etcetera, to a person whose identity is known to the grand jury, in violation of Title 21, United States Code, Section 841(a)(1)."

And it's agreed by counsel that you need not hear evidence on these points, because they're subjects of previous convictions.

Is that correct?

MS. FLEISHER: Yes, Your Honor. There is one point, though, that I think we should discuss with the Court at side bar.

THE COURT: All right.

(Discussion at side bar.)

MS. FLEISHER: Your Honor, actually there's two points. First, simply because we were off the record when

we made our agreement about it, I just want to make sure the record [238] is clear that my agreement to handle these convictions in this way is, of course, subject to the legal argument that I made on my motion to dismiss at an earlier time before the Court.

THE COURT: Certainly. Noted.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Criminal No. 2:89-00003-06

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GARLAND ARNOLDT,
Defendant.

ORDER

[Entered Aug. 29, 1989]

Pending before the Court is the motion of the Defendant for judgment of acquittal or, in the alternative, for a new trial. Inasmuch as the grounds for the motion have previously been raised by the Defendant and considered by the Court, the Court finds no basis now for setting aside the jury's verdicts or granting a new trial.

Accordingly, the Defendant's motion for judgment of acquittal or for a new trial is denied.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: August 29, 1989

/s/ Charles H. Haden II
CHARLES H. HADEN II
Chief Judge

STATUTES AND RULE INVOLVED

Title 28 U.S.C. § 636

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitioners challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United

States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter re-

ferred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district court, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmance as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts

to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointments of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the

territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

Title 18 U.S.C. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities n the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities

of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections [1] (a), (b), or (c) of this section.

Fed. R. Crim. P. 25

Rule 25. Judge; Disability

(a) DURING TRIAL. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

(b) AFTER VERDICT OR FINDING OF GUILT. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

(2)

No. 91-1125

In the Supreme Court of the United States

OCTOBER TERM, 1991

GARLAND ARNOLDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's designation of a United States magistrate to preside over the return of the jury's verdict violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution.

2. Whether petitioner's prosecution for racketeering offenses violated the Double Jeopardy Clause because some of the predicate acts of racketeering involved criminal conduct for which petitioner had previously been convicted.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 947 F.2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1991. The petition for a writ of certiorari was filed on January 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After two jury trials on a severed indictment in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846; three counts of cocaine distribution, in violation of 21 U.S.C. 841(a)(1); one count of possession of ammunition by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 98 months' imprisonment, to be followed by five years of supervised release, and fined $5,000.

After a third trial on a separate indictment in the Southern District of West Virginia, petitioner was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); four counts of drug distribution, in violation of 21 U.S.C. 841(a)(1); and eight counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to 292 months' imprisonment, to be followed by five years of supervised release.

On a consolidated appeal, the court of appeals affirmed all the convictions, but vacated the sentences and remanded for resentencing. Pet. App. 1a-16a.

1. The evidence showed that in 1981 and 1982, petitioner distributed quaaludes, LSD, and marijuana that he had obtained from Kenneth McMillion, a member of the Pagan Motorcycle Club. Petitioner became a member of the Pagans in September 1985, after he had been arrested for a transaction involving 100 pounds of

marijuana and had refused to cooperate with the authorities in the ensuing investigation. Gov't C.A. Br. 7.

During petitioner's membership in the Pagans, McMillion distributed LSD to petitioner for resale in quantities of 500 to 1,000 "hits," or doses. Petitioner also participated in a variety of transactions involving marijuana, cocaine, and PCP. Petitioner made trips to Florida and Detroit to obtain cocaine that was brought back to West Virginia and sold. Gov't C.A. Br. 8.

On three occasions in April and May 1988, petitioner sold cocaine to government informant Glen "Banty" Clay. In June 1988, petitioner traveled to Ohio to obtain cocaine, which eventually was brought to West Virginia. That same month, petitioner became president of the newly formed Kentucky chapter of the Pagans. Gov't C.A. Br. 8-9.

On June 22, 1988, petitioner met Clay for the purpose of obtaining payment for their previous cocaine transaction. Following the payment, petitioner was arrested. A search of the van petitioner was driving at the time of his arrest uncovered two firearms and drug paraphernalia. Gov't C.A. Br. 9.

2. On August 2, 1988, petitioner was named in an eight-count indictment in the Southern District of West Virginia. After he successfully moved to sever the charges, he faced two trials on that indictment. In the first trial, held on November 7-9, 1988, petitioner was tried for conspiring to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); distributing cocaine in March 1988 (Count 2), on April 18, 1988 (Count 3), on May 4, 1988 (Count 4), and on May 16, 1988 (Count 5), all in violation of 21 U.S.C. 841(a)(1); and carrying and using a firearm in relation to the commission of a drug trafficking offense on June 22, 1988 (Count 8), in violation of 18 U.S.C. 924(c)(1).

Following closing argument and the charge to the jury at petitioner's first trial, the district court announced that it intended to delegate to a magistrate the responsibility for presiding over the return of the jury's verdict. Petitioner did not object to that delegation. The jury then found petitioner guilty on Counts 1, 3, 4, and 5, and not guilty on Counts 2 and 8. The magistrate received the verdict, polled the jury, and remanded petitioner to custody. Pet. App. 3a.

Subsequently, petitioner was tried on December 6-7, 1988, for possession of ammunition by a convicted felon on June 22, 1988 (Count 6) and possession of firearms by a convicted felon on June 22, 1988 (Count 7). He was convicted on both counts and sentenced on Counts 1, 3, 4, 5, 6, and 7 to a total of 98 months' imprisonment, to be followed by five years' supervised release, and a $5,000 fine.

3. Petitioner was indicted again in the Southern District of West Virginia on January 10, 1989. He was named in 14 counts of an 85-count indictment. Count 1 charged him with participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Count 2 charged him with conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). Counts 5, 6, 8, 9, 11, 12, 67, and 69 charged him with interstate travel in aid of racketeering in April 1986, in June 1986, and on June 12, 1988, in violation of 18 U.S.C. 1952(a)(3). Counts 7, 10, 13, and 71 charged him with possession of cocaine with intent to distribute it in April 1986, in June 1986, and on June 13, 1988, in violation of 21 U.S.C. 841(a)(1). He was convicted on all counts and sentenced to a total of 292

months' imprisonment, to be followed by five years of supervised release. His sentence was set to run concurrently with the sentence imposed on his earlier convictions.

4. On appeal, petitioner contended that the district court's designation of a magistrate to preside over the return of the jury's verdict at his first trial violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution. The court of appeals observed that, although the Federal Magistrates Act does not explicitly authorize a magistrate to preside over the return of a jury verdict, it contains a residual provision, 28 U.S.C. 636(b)(3), authorizing the designation of a magistrate to perform "such additional duties as are not inconsistent with the Constitution and the laws of the United States." Pet. App. 5a-6a. Relying on *Peretz* v. *United States*, 111 S. Ct. 2661 (1991), the court then held that petitioner waived his constitutional claim by failing to object to the delegation. Pet. App. 6a-7a. The court also rejected petitioner's statutory claim, noting that the legislative history of the Act indicates that the "additional duties" clause permits a magistrate to accept return of a jury verdict where the trial judge is unavailable. *Id.* at 7a.

Relying on *Grady* v. *Corbin*, 495 U.S. 508 (1990), petitioner also contended that the Double Jeopardy Clause barred his RICO prosecution because the RICO counts in his second indictment included as predicate acts the three cocaine distribution offenses and the conspiracy to distribute cocaine for which he had been convicted at his first trial. The court of appeals observed that in *Garrett* v. *United States*, 471 U.S. 773 (1985), the

Supreme Court had rejected a similar claim in the context of a prosecution for engaging in a continuing criminal enterprise under 21 U.S.C. 848. Pet. App. 11a. The court then concluded that "the principles enunciated in *Grady* govern the paradigmatic 'single course of conduct' case, but that prosecutions under statutes such as RICO and CCE—statutes targeted at 'multilayered' instances of criminal conduct invariably occurring at different places and times—call for a calculus reflecting the concerns expressed in *Garrett*." *Id.* at 13a. Noting that the most recent predicate acts alleged in the RICO indictment were not discovered until after the return of the initial indictment, the court added that the government should not be required to choose between "proceed[ing] against a defendant for violations that might later serve as predicate acts and foreclos[ing] a RICO prosecution in the future [and] allow[ing] predicate acts to go unpunished in anticipation that at some future time the RICO elements would coalesce." *Id.* at 14a.

ARGUMENT

1. Petitioner renews his contention (Pet. 3-20) that the district court's designation of a United States magistrate to preside over the return of the jury's verdict violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution. The court of appeals correctly rejected that claim.

a. As petitioner contends, in enumerating some of the duties that may be performed by a magistrate, the Federal Magistrates Act does not mention acceptance of a jury verdict in a felony case. 28 U.S.C. 636(b). The Act does provide, however, that "[a] magistrate may be

assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28U.S.C. 636(b)(3). The legislative history of the Act explicitly states that the "additional duties" clause "would permit * * * a magistrate to * * * accept returns of jury verdicts where the trial judge is unavailable." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976). In light of that clear congressional command, the district court did not err in permitting the magistrate to receive the verdict. The only other court of appeals to address the issue has reached the same conclusion. *United States* v. *Day*, 789 F.2d 1217, 1224 (6th Cir. 1986).

Petitioner argues (Pet. 8-9) that allowing a magistrate to accept a jury verdict is inconsistent with Fed. R. Crim. P. 25, which provides that, although a trial judge may be replaced with another judge for reason of absence after the return of the verdict, he may be replaced during trial only for reason of death, sickness, or other disability. However, Rule 25 does not address the reasons for which a trial judge may designate a magistrate. Unlike a replacement judge, who obtains complete authority over a case once he is appointed and whose conduct of the case is unreviewable by the original judge, a magistrate serves under the trial judge's "total control and jurisdiction," and his actions are subject to the trial judge's review. *Peretz* v. *United States*, 111 S. Ct. 2661, 2670 (1991). Accordingly, Rule 25 addresses a situation—the total replacement of the trial judge—that is remote from the designation of a magistrate to perform a specified duty under the trial judge's supervision.[1]

[1] In *Day*, the Sixth Circuit rejected the same Rule 25 argument advanced by petitioner here. See 789 F.2d at 1224.

Petitioner's reliance on *Government of the Virgin Islands* v. *Paniagua*, 922 F.2d 178 (3d Cir. 1990), is misplaced. In that case, the magistrate performed such functions as responding to a jury note, giving a supplemental jury instruction, and declaring a mistrial—substantive trial duties that differ substantially from the essentially administrative function of receiving a verdict. In expressing "serious reservations" about a magistrate's authority to declare a mistrial, the court stated that it did "not understand how [that] procedure * * * can be reconciled with Fed. R. Crim. P. 25." 922 F.2d at 183. The court's decision, however, did not turn on any argument based on Rule 25, since the court went on to affirm the defendant's conviction based on the defendant's acquiescence in the magistrate's action. *Id.* at 183. Likewise here, petitioner acquiesced in the magistrate's acceptance of the verdict by failing to make an objection. That fact provides an independent basis for rejecting petitioner's statutory claim. See *Peretz*, 111 S. Ct. at 2671 (holding that supervision of *voir dire* is an additional duty that may be delegated to a magistrate under the Act "when the defendant raises no objection").

b. Petitioner's failure to object also defeats his constitutional claim. In *Peretz*, the Court held that, in light of the fact that the most basic rights of criminal defendants are subject to waiver, a defendant may waive his right to have an Article III judge preside during jury selection. The right to have an Article III judge receive the verdict—a far more ministerial task than jury selection—is equally subject to waiver.

Petitioner attempts (Pet. 10) to distinguish *Peretz* on the ground that *voir dire* occurs early enough in the proceedings to make abortion of the trial practical if the

magistrate's performance is deficient, while "[t]hat is hardly the case at the verdict stage, when it may realistically be expected that the [trial] judge would cause the entire trial to be redone only in the face of the most egregious error by the magistrate." But in this case, petitioner did not ask the trial judge to review any action by the magistrate. See *Peretz*, 111 S. Ct. at 2665. Furthermore, if the magistrate had erred in a manner that affected the defendant's substantial rights, it would have been the judge's duty to correct that error by holding a new trial. "To suppose that the trial judge would be dissuaded from carrying out that duty by the public expense of a new trial is to ignore the constitutionally preserved independence of Article III judges." *United States* v. *Saunders*, 641 F.2d 659, 664 (9th Cir. 1980), cert. denied, 452 U.S. 918 (1981).

2. Petitioner also contends (Pet. 20-23) that the RICO counts were barred by the Double Jeopardy Clause because they alleged as predicate acts conduct for which petitioner had previously been convicted.

a. In *Garrett* v. *United States*, 471 U.S. 773 (1985), this Court held that the Double Jeopardy Clause did not bar the use of a drug importation offense for which the defendant had previously been prosecuted as a predicate offense in a CCE prosecution. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, 471 U.S. at 779-786, the Court went on to express "serious doubts" that the predicate drug violations were lesser included offenses within CCE, *id.* at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and to place, involved in

this case." *Id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Id.* at 786. Nevertheless, assuming *arguendo* that CCE and its predicate offenses are the same offense, the Court concluded that the successive prosecutions did not violate the Double Jeopardy Clause because the CCE offense continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

b. Applying the analysis of *Garrett*, petitioner's successive prosecutions did not violate the Double Jeopardy Clause. Just as Congress intended to permit successive prosecutions for CCE and its predicate drug offenses, so it intended to permit successive prosecutions for RICO and its predicate acts of racketeering. Under RICO, the last alleged predicate act of racketeering must occur within 10 years after the commission of the prior predicate act "excluding any period of imprisonment." 18 U.S.C. 1961(5). That language suggests that Congress envisioned the situation in which a defendant is convicted and sentenced for a racketeering act and later charged with a RICO violation based in part on the prior conviction. See *United States* v. *Grayson*, 795 F.2d 278, 282 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987). Further, in enacting RICO, Congress declared in its Statement of Findings and Purpose that it intended to establish "new penal prohibitions" and "enhanced sanctions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. Barring the use in RICO prosecutions of predicate offenses for which the defendant previously has been convicted "would

nullify the intent and effect of the RICO prohibitions." *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

In addition, like the CCE offense considered in *Garrett*, a RICO violation is not the "same offense" for double jeopardy purposes as any of its predicate acts. Like a CCE charge, a RICO charge requires proof of multiple criminal acts occurring over an extended period of time and an ongoing criminal association often involving a large group of individuals. RICO expresses these requirements by means of its prohibition against conducting an "enterprise" through "a pattern of racketeering activity"; the pattern in question requires proof of at least two related predicate acts that amount to, or pose a threat of, continuing criminal conduct. 18 U.S.C.1962(c); see *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Because of the complex nature and scale of activity targeted by RICO, the criminal threat posed by a RICO violation is not equivalent in any meaningful sense to the discrete underlying predicate crimes.

In light of *Garrett*, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar the use of an offense for which the defendant has already been prosecuted as a predicate act of racketeering in a RICO case. *E.g.*, *United States* v. *O'Connor*, No. 90-3105 (7th Cir. Jan. 28, 1992); *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir.), cert. denied, 112 S. Ct. 178 (1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir.), cert. denied, 112 S. Ct. 54 (1991), and petition for cert. pending, No. 91-31; *United States* v. *Pungitore*, 910 F.2d 1084, 1108-1111

(3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Licavoli*, 725 F.2d 1040, 1049-1050 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1980), cert. denied, 459 U.S. 1206 (1983).

c. Quite apart from the difference for double jeopardy purposes between RICO and its predicate crimes, petitioner's successive prosecutions were permissible under *Garrett* because, according to the indictment, the RICO offenses continued to January 1989—past the date of petitioner's earlier indictment on August 2, 1988. Although the RICO counts do not specify any act personally committed by petitioner after the return of the earlier indictment, they do allege such acts by petitioner's co-conspirators. Count 1 ¶¶ 27(e), 36(c), 37(b). Under *Garrett*, the government was not required to prosecute in August 1988 RICO offenses that continued after that date. 471 U.S. at 791-793. Furthermore, the most recent predicate act alleged against petitioner was not discovered until after the date of the first indictment. Pet. App. 14a. See *Brown* v. *Ohio*, 432 U.S. 161, 169 n. 7 (1977) (Double Jeopardy Clause does not bar successive prosecution "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence").

d. In support of his double jeopardy claim, petitioner invokes *Grady* v. *Corbin*, 495 U.S. 508, 510 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution,

the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, however, does not help petitioner.

First, *Grady* does not apply to RICO prosecutions. In *Grady*, the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A RICO charge, by contrast, entails proof of multiple offenses committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the court stated in *Garrett*, 471 U.S. at 788, such an offense does not "lend itself to the simple analogy of a single course of conduct." As the courts of appeals have held, *Garrett* (and not *Grady*) controls the permissibility of successive prosecutions for RICO and its predicate offenses. *E.g.*, *O'Connor*, slip op. 4-9; *Gonzalez*, 921 F.2d at 1535-1539; *Gambino*, 920 F.2d at 1112-1113; *Pungitore*, 910 F.2d at 1111.

In addition, *Grady* explicitly reaffirmed the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed—or the government had not discovered the facts necessary to prove it—at the time of the indictment in the earlier case. 495 U.S. at 516 n.7. In light of the allegations in this case of predicate acts that took place after the date of the first indictment, as well as the fact that the government did not know of some of the predicate acts committed by petitioner until after that date, there was clearly no constitutional bar to bringing a successive prosecution under the RICO statute in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

☆ U.S. GOVERNMENT PRINTING OFFICE 1992-312 324/45378